85-1845

No. _____

Supreme Court, U.S.
FILED
MAY 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1985 - 1986

JAMES N. CONSTANT,

Petitioner

v.

ADVANCED MICRO-DEVICES, INC., et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

James Constant
1603 Danbury Drive
Claremont, CA 91711
(714) 624-1801

Pro se petitioner

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* see the attached Certificate of Service for a complete list of all parties

761P

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, where Constitutional and Civil rights claims are involved, judgement to dismiss claims can be made without the considerations of proof of record and discovery?

2. Whether a paragraph in the complaint which is incorporated by reference in a non-dismissed claim and bears to it directly should be dismissed when the claim under which it appears is dismissed?

3. Whether a proper yardstick was used to determine that a political question exists so that Constitutional issues are for Congress and not the Court to decide?

4. Whether, having established the law of the case *sua sponte*, a court is free to treat the parties unequally without Constitutional limitation?

5. Whether a pleading which fails to cite 35 U. S. C. 282 raises a political question?

6. Whether a pleading which fails to allege a prima facie showing of invalidity meets the burden of persuasion under 35 U. S. C. 282?

7. Whether the Due Process Clause of the Fifth Amendment prohibits federal legislation which impairs rights under the Patent Grant contract?

8. Whether the effect of the Order (App. E) is fundamental to the further conduct of the case and to the way science is promoted in the United States?

28 U.S.C. ¶2403 (a) may be applicable.

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1985 - 1986

NO. _____

JAMES CONSTANT,

Petitioner

v.

ADVANCED MICRO-DEVICES, INC., et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

The petitioner, James Constant, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Federal Circuit issued on 3 March, 1986.

OPINION BELOW

The Court of Appeals filed its order, declining interim review of the district court's "interlocutory order", on 24 February, 1986 and issued its mandate on 3 March, 1986. Copies of the Court of Appeal's order and mandate are attached as APPENDIX A.

The Court of Appeals denied petitioner's petitions for a rehearing, to vacate the mandate of 3 March, 1986, and to direct, by way of writ of mandamus, the district court to reverse its order of 11 July, 1985 dismissing certain of petitioner's claims, on 1 April, 1986. A copy of the Court of Appeal's order is attached as APPENDIX B.

JURISDICTION

On 3 March, 1986 the Court of Appeals issued judgement dismissing petitioner's appeal on motion of the appellees. (App. A). The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article 1, Section 8, Clause 8:

> The Congress shall have the power to mandate the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

United States Constitution, Article 1, Section 10:

> No state shall . . . pass any . . . law impairing the obligation of contracts

United States Constitution, Article 3, Section 2, Clause 1:

> The judicial power shall extend to all cases . . . to controversies . . . between citizens . . .

United States Constitution, 4th Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . .

United States Constitution, 5th Amendment:

> No person shall . . . be deprived of . . . liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

United States Constitution, 10th Amendment:

> The powers not delegated to the United States by the Constitution, not prohibited to it by the States, are reserved to the States respectively, or to the people.

United States Constitution, 14th Amendment:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In January 1985, petitioner filed a ten-count complaint against 17 defendants alleging infringement of Constitutional (claims 1, 3 and 10), Civil (claims 2 and 4), Patent (claim 5), Federal Unfair Competition (claim 6), Antitrust (claims 7 and 8), and California Unfair Competition (claim 9) rights.

On 11 March, 1985, the District Court dismissed with leave to amend all but claim 5, the claim alleging patent infringement, for failure to state claims upon which relief could be granted. Petitioner thereafter filed a first and second amended complaints which amended and essentially reiterated the allegations of the original complaint. Respondents moved to dismiss all but claim 5 of the second amended complaint pursuant to Rule 12(b) (6) and moved to strike certain paragraphs

pursuant to Rule 12 (f), including paragraphs 62 of claim 1 [alleging unconstitutionality of 35 U. S. C. 282 (2) and (3)]and 83 of claim 3 (alleging unconstitutionality of Federal R&D laws).

By order entered on 11 July, 1985, the District Court dismissed all but claim 5 of the second amended complaint for failure to state any claims upon which relief could be granted and ordered certain material in the complaint stricken because it was immaterial or redundant. The stricken material included paragraph 101 of non-dismissed claim 5 incorporating paragraphs 62 and 83 by reference. A copy of the District Court's Order of 11 July, 1985 is attached as APPENDIX C.

Respondents then answered the remaining allegations in claim 5 and filed affirmative defenses and substantially similar counterclaims for declaratory

relief, seeking determinations that petitioner's patents are invalid, unenforceable and not infringed.

Petitioner responded with affirmative defenses to each counterclaim which were substantially similar to the dismissed claims and moved for summary judgement, and demanded a jury trial for the defenses. Respondents opposed the summary judgement and jury trial motions and moved to strike portions of petitioner's affirmative defenses to counterclaims pursuant to Rule 12 (f).

By Order entered on 10 October, 1985, the District Court denied petitioner's summary judgement and jury trial motions on grounds claims 1 - 4 and 6 - 10 had been conclusively adjudicated and dismissed with prejudice by the Order entered 11 July, 1985. Further, the District Court sua sponte ordered petitioner's affirmative

defenses dismissed as no more legally sufficient to state a defense than a similar claim dismissed by the Order of 11 July, 1985 (App. C). A copy of the District Court's Order of 10 October, 1985 is attached as APPENDIX D.

Petitioner moved, pursuant to Rule 57, for declaratory judgements holding that 35 U. S. C. 282 (2) and (3) and Federal R&D laws are unconstitutional because they are inconsistent with Article 1, Section 8, Clause 8 of the Constitution. In addition, petitioner moved, pursuant to Rules 12 (b) (6) and 12 (f) to dismiss and strike respondent's affirmative defenses and substantially similar counterclaims because they do not cite 35 U. S. C. 282 and are materially and legally defective.

By Order entered on 20 December, 1985, the District Court denied petitioner's motions for declaratory judgements on the

grounds these were procedurally defective and the constitutional issues are for Congress not the District Court to decide. Further, the District Court denied petitioner's motion to dismiss and strike respondent's affirmative defenses and counterclaims on the grounds this motion was procedurally defective and because pleadings give petitioner sufficient notice of the nature and basis of the affirmative defenses and substantially similar counterclaims. A copy of the District Court's Order of 20 December, 1985 is attached as APPENDIX E.

Petitioner then filed his notice of appeal from the District Court's Order of 20 December, 1985. The Court of Appeals declined to review the "interlocutory" order and denied petitioner's petitions for a rehearing, to vacate its mandate, and to reverse the District Court's Order of 11 July, 1985 (App. A, B).

REASONS FOR GRANTING THE WRIT

1. The Order (App. E) is Appealable as of Right because Constitutional and Civil Rights Claims were Dismissed Prematurely

The Order in favor of respondents on petitioner's claims under the Constitution, Article 1 Section 8, Clause 8, Article 1, Section 10, 4th, 5th, 10th and 14th Amendments thereof, and 42 U. S. C. 1983 and 1985 (2) and (3) (App. C) was premature since there was material fact issue as to federal action and since petitioner's proof of record and further discovery of the federal nexus were barred by the order. Where Constitutional and Civil rights claims are involved, summary judgement should not be granted prior to petitioner's having discovery. Tarleton v. Meharry Medical College, (CA 6th, 1983) 717 F.2d 1523. This error is relied upon by

the District Court to support its ruling that there are no claims remaining for declaratory relief in the case (App. E-6).

2. The Order (App. E) is Appealable as of Right because Paragraph 101 of Non-Dismissed Claim 5 is a Claim for Declaratory Relief

The Order dismissing Constitutional and Civil Right_ claims (App. C) was error in dismissing paragraphs 62, 83, I-1 and III-1 as to non-dismissed patent claim 5. The cited paragraphs allege 35 U.S.C. 282 (2) and (3) and Federal R&D laws are unconstitutional and were incorporated by reference into the also dismissed paragraph 101 of non-dismissed patent claim 5. Dismissed paragraphs 62 and 83 bear directly on the relief sought by petitioner in non-dismissed patent claim 5. This error is relied upon by the District Court to support its ruling that there are no claims

remaining for declaratory relief in the non-dismissed patent claim 5 (App. E-6)

3. The Order (App. E) is Appealable because it Fails to Apply the Yardstick a Court must use to Determine Whether a Matter is a Political Question

In Baker v. Carr, 369 U.S. 186, 215 (1962) this Court established the rule that

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution". (underline added)

In Powell v. McCormack, 395 U.S. 486, 518 et. seq. the Court established the yardstick a court must use to determine whether a matter is a "political question".

> "On the surface of any case held

> to involve a political question is at least one of the following formulations: a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncement by various departments on one question."

The Order (App. E) denying petitioner's motions for declaratory judgement is error because it fails to apply the yardstick in Powell in its determination that constitutional issues are for Congress and not the Court to decide.

4. The Order (App. E) is Appealable because it denies Petitioner the Equal Protection of the Law

By Order (App. D-6) the District Court sua sponte granted late motions by some respondents and by Order (App. E-7) denied petitioner's late motion. In effect, having established the law of the case sua sponte, the District Court applies this law unequally to petitioner and to respondents. This denial of equal protection of the law to petitioner is error. The District Court is not free to treat petitioner and respondents unequally without constitutional limitation. Bolling v. Sharpe, 347 U. S. 497 (1954).

5. The Order (App. E) is Appealable because Respondent's Pleadings are Non-Justiciable and are Materially and Legally Defective.

a. Pleadings are Non-Justiciable

Respondent's pleadings do not cite 35 U. S. C. 282, the only statute

in the patent law which authorizes defenses and review by a federal court. Rather, respondent's pleadings cite or refer to patent statutes committed by Congress for adjudication by the Patent Office.

A defense and court review under 35 U. S. C. 282 requires the citing of that statute in the pleadings for the simple reason that not citing the statute raises a "political question", namely, the interference by the judiciary in adjudicating statutes normally committed by Congress for adjudication by the Patent Office.

Article 3 of the Constitution limits the power of the federal courts to considerations of cases or controversies. This Court has held that the case-or-controversy requirement includes four elements: standing, ripeness, mootness, and the absence of a political

question. Any case or controversy that fails to satisfy any of these four requirements is not a case or controversy within the meaning of Article 3, and the federal courts therefore lack jurisdiction to decide it. Baker and Powell, supra.

The order (App. E) denying petitioner's motion to dismiss and strike respondent's affirmative defenses and substantially similar counterclaims is an usurpation of power because respondent's pleadings do not cite 35 U. S. C. 282 and therefore fail to satisfy the "political question" requirement of a case or controversy. Further, the Order (App. E) is error because it fails to apply the yardstick in Powell supra in its determination that respondent's pleadings are justiciable absent the citing of 35 U. S. C. 282 therein.

b. Pleadings are Materially Defective

By its terms, 35 U. S. C. 282 prescribes that the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity. Respondents have this burden at all times including when making their answers, affirmative defenses and counterclaims. Respondent's pleadings have failed to allege a prima facie showing of invalidity, unenforceability and non-infringement of petitioner's patents.

> "Patent shall be presumed valid and burden of persuasion is and always will remain on party asserting invalidity." General Motors Corp. v. U.S. Int. Trade Com. Cust. & Pat. App. 1982, 687 F.2d 476, cert. den. 103 S. Ct. 729.

Rather, respondent's pleadings cite or refer to numerous patent statutes which could be made potential

defenses under 35 U. S. C. 282 had that statute been cited in their pleadings. In effect, respondent's pleadings give petitioner notice of unlimited potential and conjectured defenses and subject petitioner to unlimited discovery requests by respondents. Petitioner must prepare for unlimited conjectured defenses the exact nature of which is unknown.

Without any limitation for meeting the burden of persuasion prescribed by 35 U. S. C. 282 in their pleadings, respondents are free to use their unrestricted pleadings for discovering a valid cause of defense rather than discovery based on something more than unlimited conjectures.

The Order (App. E) denying petitioner's motion to dismiss and strike respondent's affirmative defenses and substantially similar counterclaims is error

because respondents have failed to meet their burden of persuasion in answering petitioner's second amended complaint.

c. Pleadings are Legally Defective

By Orders (App. C, D) the District Court sua sponte granted respondent's motions to dismiss and strike petitioner's claims and substantially similar affirmative defenses to counterclaims as being insufficient and by Order (App. E- 8,9) denied petitioner's motion to dismiss and strike respondent's affirmative defenses and substantially similar counterclaims as being sufficient. In effect, having established the law of the case sua sponte, the District Court applies this law unequally to petitioner and to respondents. This denial of equal protection of the law to petitioner is error. The District Court is not free to

treat petitioner and respondents unequally without constitutional limitation. Bolling v. Sharpe, 347 U. S. 497 (1954).

6. The Order (App. E) is Appealable because the Due Process Clause Prohibits Federal Legislation which Impairs Rights under the Patent Grant Contract.

In Thorpe v. Housing Authority of Durham, 393 U. S. 268, this Court stated that rights arising out of a contract with the Government are protected by the due process clause of the Fifth Amendment. In Hepburn v. Griswold, 75 U. S. 603, the Court stated that a law of Congress not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of a contract, is inconsistent with the spirit of the Constitution. And, in Murray v. Charleston, 96 U. S. 449, the Court stated that the inviolability of contracts and the duty of

performing them, as made, are at the foundation of all well-ordered society, that to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed, and it is one of the highest duties of this Court to "take care that the prohibition should neither be evaded or frittered away".

The Order (App. E) allows respondents to assault petitioner's Patent Grant contract with the Government under laws of Congress which are not consistent with Article 1, Section 8, Clause 8 of the Constitution and with pleadings that are not justiciable and are materially and legally defective. Petitioner's Patent Grant contract with the Government is not likely to survive, as made, for the term of the grant. The assault upon petitioner's Patent Grant contract is an assault on his liberty

and property without due process of law and constitutes a taking of his property for public use without compensation.

7. The Order (App. E) is Appealable Because Its Effect Is Fundamental to the Further Conduct of the Case and to the Way Science is promoted in the United States

In Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1949) and in Gillespie v. United States Steel Corp., 397 U. S. 148 (1964) this Court interpreted 28 U. S. C. 1291 to allow for the exercise of immediate appellate jurisdiction where the effect of the order was "fundamental to the further conduct of the case".

This writ should be granted because petitioner's right to relief depends from the construction of 35 U. S. C. 282 (2) and (3) and Federal R&D laws and the

determination of the sufficiency of respondent's pleadings.

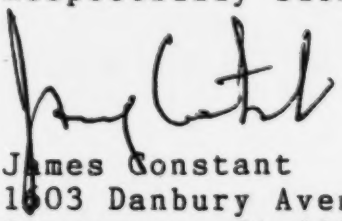
> "The general rule is that, where it appears from the bill or the statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States . . . . . the district court has jurisdiction". Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 65 L.Ed 577, 41 S.Ct. 243

The compelling public reason the present writ should be granted is to assure that science in the United States is promoted by securing patent rights to inventors rather that by securing patent legislation and the largesse of Federal R&D laws to rich and powerful corporations to break inventors and their patents and to infringe inventor's constitutional, civil and business rights with impunity.

CONCLUSION

For the foregoing reasons, petitioner James Constant respectfully requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted



Dated:
7 May, 1986

James Constant
1603 Danbury Avenue
Claremont, CA 91711
(714) 624-1801

Pro se petitioner

APPENDIX A

Note: This order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

JAMES CONSTANT, Plaintiff-Appellant,	)	Appeal
v.	)	No. 86-786
ADVANCED MICRO-DEVICES, INC., et al.,	)	ON MOTION
Defendents-Appellees.	)	

Before NEWMAN, BISSELL, and ARCHER, Circuit Judges.

O R D E R

Defendants-appellees NEC Electronics, Inc. and Analog Devices, Inc. move to dismiss the appeal of James Constant from an

order of the United States District Court for the Central District of California, denying Mr. Constant's motion for "declaratory judgments" that 35 U.S.C. ** 282(2) and (3) and federal laws relating to scientific research and development are unconstitutional, and that the defendants' answers and defenses based on these laws should be stricken. Movants assert that the appealed order is interlocutory and therefore not appealable as of right.

The district court correctly held that Mr. Constant had not brought a declaratory judgment action, despite his having so designated it. Thus an appeal as of right does not lie.

Mr. Constant asserts that he requested the district court to certify the appeal, and that the district court did not respond to this request. As summarized in 9 J. Moore, Moore's Federal Practice * 110.09 at

126, "unless the district court expressly determined that there was no just reason for delay", an interlocutory appeal is premature.

Mr. Constant asserts that the "Gillespie Rule" nevertheless establishes a basis for appellate jurisdiction. Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964). Review on this basis is granted only in limited circumstances. On the facts before us, we decline interim review of this interlocutory order.

Accordingly,

IT IS ORDERED THAT:

The appeal is dismissed.

FOR THE COURT

February 21, 1986

Pauline Newman
Circuit Judge

FILED: U.S. Court of Appeals for the Federal Circuit 2/24/86 Francis X. Gindhart, Clerk

cc: Joseph C. Sullivan, Esq.
Philip P. Berelson, Esq.
James Constant
Joseph H. Golant, Esq.
John M. Calimafde, Esq.
Howard A. Silber, Esq.
Dr. Edward E. Sachs
Howard Brody, Esq.
Gerald T. Sekimura, Esq.
Allen M. Katz, Esq.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

JAMES CONSTANT,
Appellant

vs. Appeal No. 86-786

ADVANCED MICRO-DEVICES, INC., et al.,
Appellee

JUDGMENT

ON APPEAL from the U.S. District Court of California, Central District, Los Angeles.
IN CASE No(s). CV 85-0262 PAR

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED: Dismissed on Motion of the Appellee's.

Entered by Order of the Court

Francis X. Gindhart, Clerk

Dated: Feb. 21, 1986

Issued as a Mandate: March 3, 1986

APPENDIX B

Note: This order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

JAMES CONSTANT, Plaintiff-Appellant,	)	
v.	)	Appeal No. 86-786
ADVANCED MICRO-DEVICES, INC., ET AL, Defendants-Appellees.	)	ON MOTION

Before MARKEY, Chief Judge.

O R D E R

James Constant has petitioned the court for leave to file a petition for rehearing out of time; to vacate the court's mandate of March 3, 1986 and to direct, by way of writ of mandamus, the district court to reverse an order of July 11, 1985 dismissing certain of Constant's claims.

As grounds for these motions, Constant alleges delay in the receipt of the court's order from which rehearing is requested, and asks the court to construe certain paragraphs in his complaint as an underlying pleading for declaratory judgment.

Constant's motions are opposed by Fujitsu Microelectronics, Inc. The court finds no merit to Constant's arguments.

Therefore, having considered the submissions of the parties

IT IS ORDERED:

Constant's motions for leave to file a petition for rehearing out of time, for vacating the mandate, and for a petition for writ of mandamus are denied.

FOR THE COURT
Howard T. Markey
Chief Judge

Date: 28 March 86

FILED: U. S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT April 1, 1986
Francis X. Gindhart, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES CONSTANT, Plaintiff	)	No. 85-0262-PAR (Bx)
v.	)	ORDER PROPOSED
ADVANCED MICRO-DEVICES, INC.,et al., Defendants	)	

Defendants' Motions to Dismiss, Motions to Strike, and Motions for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12, came on for hearing on June 24, 1985. Plaintiff appeared in pro per; Defendants Rockwell International Corporation and TRW, Inc. were represented by their attorneys, Jeffrey I. Weinberger and Diane M. Johnsen, of Munger, Tolles & Rickershauser; defendants Advanced Micro-Devices, Inc. and Intel Corporation were represented by their attorney, Philip P. Berelson, of Brown and Bain; defendants Gould, Inc. and American Microsystems, Inc. were represented by their

attorney, Thomas D. Phillips, of Romney, Golant, Martin & Ashen; defendants Analog Devices, Inc. and NEC Electronics, Inc. were represented by their attorney, Craig S. Summers, of Pretty, Schroeder, Brueggemann & Clark; defendant Fujitsu Microelectronics, Inc. was represented by its attorney, Adrian Pruetz, of Morrison & Foerster; defendants Digital Switch Corp. and Granger Associates were represented by their attorney, Howard P. Brody, of Grossman, Graven, Perry & Block; defendant Texas Instruments Incorporated was represented by its attorneys, Paul S. Malingagio, of Sheppard, Mullin, Richter & Hampton, and Jerry R. Selinger, of Baker, Smith & Mills; and defendant Paradyne Corporation was represented by its attorney, Kristin M. Cano, of Curtis & Vaccaro.

Having considered the papers filed by the parties and having heard oral argument,

and for the reasons set forth in its tentative opinion, attached hereto, the Court hereby:

1. Grants the Motions for Judgment on the Pleadings brought by NEC Electronics Incorporated and Analog Devices, Inc. as to Counts 1, 2, 3, 4, 6, 7, 8, 9, and 10 of the Second Amended Complaint and orders that said Counts be and hereby are dismissed with prejudice as to said defendants;

2. Grants the other defendants' Motions to Dismiss counts 1, 2, 3, 4, 6, 7, 8, 9, and 10 of the Second Amended Complaint and orders that said Counts be and hereby are dismissed with prejudice as to said defendants; and

3. Grants each defendant's Motion to Strike paragraphs 101 and 109, and material labelled "Case Background" and "Summary" of the Second Amended Complaint.

The Court further orders that defendants have 30 days from the entry of this Order in which to answer Count 5 of the Second Amended Complaint, and denies plaintiff's request that its ruling on Counts 1, 2, 3, 4, 6, 7, 8, 9, and 10 be certified for immediate appeal, pursuant either to Fed. R. Civ. P. 54(b) or 28 U.S.C. * 1292(b).

HONORABLE PAMELA A. RYMER
UNITED STATES DISTRICT JUDGE

DATED: 7/2/85

TENTATIVE RULING

Constant v. Advanced Micro Devices, et al.
CV 85-262

GRANT defendants' motion to dismiss with prejudice Counts 1, 2, 3, 4, 6, 7, 8, 9 and 10 of plaintiff's second amended complaint; strike paragraphs 101 and 109 and material labelled "Case Background" pursuant to Fed. R. Civ. P. 12 (f).

Granting a motion to dismiss under Rule 12 (b) (6) is appropriate only when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41 (1957). On a motion to dismiss, the complaint is construed in the light most favorable to plaintiffs and the allegations therein are taken to be true. Russell v. Landrieu, 621 E. 2d 1037 (9th Cir. 1980).

1. Count 1 asserts a constitutional challenge to the statutory presumption of validity afforded to patents under 35 U.S.C. ¶ 282. Plaintiff alleges that by prosecuting this action under ¶ 282, defendants deprive him of his patent rights and also constitutional rights to liberty and property guaranteed by the 4th, 5th and 14th Amendments of the state and federal constitutions. Plaintiff has not alleged with sufficient specificity the manner in which defendants are "prosecuting" litigation; instead it appears that plaintiffs refers to their defense of his action. Defendants' defense of a lawsuit initiated by plaintiff does not constitute a cause of action.

Other than the rights provided by the patent laws, there is no recognized constitutional right to possess a secure patent which would support cause of action.

Moreover, neither the state nor the federal constitutions protect liberty or property rights absent state involvement. Ginn v. Matthews, 553 F.2d 477 (9th Cir. 1976); Kruger v. Wells Fargo Bank, 11 Cal. 3d 352 (1974).

2. Count 2 alleges violations of 42 U.S.C. 282 ** 1983 and 1985 (2), (3) as a result of the fact that plaintiff must maintain this lawsuit to protect his patent rights. Additionally, Count 2 alludes to the due process and equal protection clauses.

To state a cause of action under ** 1983, plaintiff must allege that defendants have acted under color of state law. Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980); "Stonecipher v. Bray, 653 F.2d 398 (9th Cir. 1981). Count 2 relies solely on federal patent law and as such does not state a cause of action under ** 1983.

Rodriguez v. Conagra, Inc., 527 F.2d 540 (9th Cir. 1976). Nor does the complaint allege the kind of state action required under ** 1983.

Section 1985 requires allegations of racial or class based discriminatory animus. Griffen v. Breckinridge, 403 U.S. 88, 102 (1971). No such class comprised of inventors has been recognized and plaintiff fails to state a claim under ** 1985.

3. Count 3 charges that the receipt by defendants of federal research and development funds is unconstitutional, deprives him of rights guaranteed by the 4th, 5th, 10th and 14th Amendments and impairs the value of his patent.

To the extent that Count 3 relies on constitutional rights, state action is required. Three factors are relevant when determining whether particular conduct constitutes state action: (1) there must be

a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state; (2) the nexus must be close enough so that the state has exercised coercive power or has provided significant encouragement so that the choice must be deemed to be that of the state; and (3) the entity has exercised the powers that are traditionally those of the state. Blum v. Yaretsky, 457 U.S. 991 (1982). Here plaintiff has not alleged sufficient state involvement in the conduct complained of to satisfy the state action requirement.

4. Count 4 alleges the same violations set forth in Count 3 although here plaintiff invokes ** 1983 and 1985. As stated above, plaintiff has not adequately alleged action taken under color of state law to properly plead a cause of action

under ** 1983. The research and development programs complained of are alleged to be federally administered and do not invoke state law. Similarly, no class based discriminatory animus is adequately alleged to state a claim under ** 1985.

5. Count 6, labelled "Federal Unfair Competition," alleges that defendants, by importing products covered by plaintiff's patents appropriate his property in violation of 28 U.S.C. ** 1338 (b). Under the latter section, which pertains to pendent jurisdiction, there is no private right of action recognized. In addition, there is no federal cause of action for importing products which infringe the plaintiff's products.

6. Count 7 alleges violations of the Sherman Antitrust Act by virtue of the defendants alleged combination to prevent him from entering markets covered by the

patent. Although plaintiff invokes section 1 of the Sherman Act, his allegations of price-fixing and concerted action in restraint of trade are vague and wholly conclusory. Nor does Count 7 allege predatory conduct with intent to restrain trade in violation of section 2.

Additionally, plaintiff has failed to allege antitrust injury -- the competitive injury which the antitrust laws seek to remedy. See Brunswick Corp v. Riegel, 752 F.2d 261 (7th Cir. 1985); Shapiro v. General Motors, 472 F.Supp. 636 (D. Md. 1980).

Plaintiff alleges that the prosection of this suit by defendants and their receipt of research and development funds constitute antitrust violations. Such conduct, legal in itself, does not amount to activities illegal under the antitrust statute.

7. Count 8 merely realleges the same conduct set forth in Count 7 and as such does not state a claim under the Clayton Act. Standing on its own, it does not adequately allege power to harm competition, price discrimination, tying and tied products or the relevant market.

8. Count 9 alleges violations of Cal. Bus. & Prof. Code 17200 et seq as a result of interfacing with and impairing his patent. Plaintiff also alleges that the defendants have induced others to infringe his patent and have confused the public as to ownership of the patent. However, plaintiff does not allege that confusion over the product stems from recognition that he owns the patent in question and no cause of action is stated.

9. Count 10 alleges that he is denied equal protection and due process because he cannot afford the attorneys' fees

he believes is necessary to conduct this litigation. Plaintiff fails to allege state action and does not state a claim for denial of due process or equal protection.

Under Rule 12 (f) the Court may strike from any pleading "any redundant, immaterial, impertinent or scandalous matter." The portion of the complaint labelled "Case Background" is not relevant to the issues remaining and should be stricken. Paragraph 101 realleges the previous 100 paragraphs and to the extent that they contain causes of action which have been dismissed they are redundant and stricken. Paragraph 109 charges defendants with failing to answer or provide discovery. As such, it is immaterial to the remaining infringement claim and should be stricken.

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES CONSTANT, Plaintiff	)	
v.	)	No. CV 85-0262-PAR ORDER
ADVANCED MICRO-DEVICES, INC. A Delaware Corporation et al., Defendants	)	

In January 1985 plaintiff filed a ten-count complaint against 17 defendants alleging patent infringement and a variety of non-patent claims. On March 11, 1985 this court dismissed with leave to amend all but Count V, the count alleging patent infringment, for failure to state claims upon which relief could be granted. Plaintiff thereafter filed a first amended complaint, which essentially reiterated the allegations of the original complaint. Defendants moved to dismiss with prejudice all but count V of the first amended complaint and moved to strike certain

paragraphs pursuant to Fed. R. Civ. P 12 (f). Before defendants motion could be heard, plaintiff filed a second amended complaint, against which the defendants again moved to dismiss. By order entered on July 11, 1985, this court dismissed, with prejudice, all but Count V of plaintiff's second amended complaint for failure to state any claims upon which relief could be granted, and ordered certain material in the complaint stricken because it was immaterial or redundant.

The various defendants then answered the remaining allegations of the plaintiff's second amended complaint, and filed counter-claims for declaratory relief, seeking determinations that plaintiff's alleged patents are invalid, unenforceable and not infringed.

Plaintiff has responded with affirmative defenses to each counterclaim which are

substantially similar to the claims made in the pleadings that have been dismissed, and with a demand for a jury trial on the claims dismissed with prejudice by this court. In addition he has filed for summary judgment on the non-infringing counts of his complaint, again counts dismissed with prejudice by this court. Defendants' have moved to strike portions of plaintiff's pursuant to Rule 12(f) on the ground that the material pleaded is immaterial, redundant, and scandalous.

SUMMARY JUDGMENT

Plaintiff has moved for summary judgment on counts I-IV and VI-X. These counts were dismissed with prejudice on July 11, 1985, and thus are no longer a part of this action. Accordingly summary judgment must be denied on the obvious ground that claims I-IV, and VI-X have been conclusively adjudicated and dismissed with prejudice.

MOTIONS TO STRIKE

Plaintiff has in effect reasserted claims dismissed with prejudice as affirmative defenses to the counterclaims. These claims are no more legally sufficient to state a defense than a cause of action. Defendants are also prejudiced by the presence of immaterial claims because plaintiff has initiated a series of discovery requests and requests for admissions that relate solely to the previously dismissed claims. In addition, plaintiff interjects various personal attacks on the corporations in this action, their officers and attorneys, and the governments of the United States and Japan. Finally, plaintiff seeks a jury trial on the dismissed claims. Defenses containing the dismissed claims in disguise and making personal attacks are properly striken as

insufficient and as immaterial, impertinent and scandalous matter.

Although not all defendants have filed motions to strike, and defendants Paradyne, Analog and NEC filed their motions outside the 20 day period required by Rule 12(f), matters which are immaterial and sham may be stricken by the court sua sponte. F.R. Civ. P. 12(f); Culinary & Service Emp. Union v. Hawaii Emp. Ben. 688 F.2d 1228 (9th Cir. 1982); Wright & Miller Federal Practice and Procedure Civil * 1382; F.R. Civ.f P. Rule 16. Accordingly it is hereby ordered:

1. The following matter in plaintiff's answers to the following defendants' counterclaims shall be stricken:

a. Hitachi: Paragraphs 72-74, 76, 78-83, 88-90.

b. Texas Instruments: Paragraphs 21-23, 25-29, 33-36.

c. NEC: Paragraphs 55-60, 64-66, 68

d. Analog: Paragraphs 53-58, 63.

e. Fujitsu: Paragraphs 71-72, 74-79, 83-85.

f. Paradyne: Paragraphs 186-188, 194-205, 209-212.

g. Digital Systems & Granger: Paragraphs 63-66, 68-69, 73-75.

h. Rockwell: Paragraphs 1-3, 5-9, 13-16.

i. American Microsystems Inc./Gould: Paragraphs 59/52-61/54, 63/56-67/61.

j. AMD/Intel: All paragraphs, on the ground that because AMD and Intel filed no counterclaim, plaintiff's entire answer is improper and is stricken.

2. Plaintiff's motion for summary judgment is denied.

3. Plaintiff's requests for a jury trial on the claims dismissed with prejudice are stricken.

Pamela Ann Rymer
United States District Judge

DATED: October 7, 1985

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES CONSTANT, Plaintiff	)	No. CV 85-0262-PAR
v.	)	ORDER
ADVANCED MICRO-DEVICES, INC., et al., Defendants	)	

In January 1985 plaintiff filed a ten-count complaint against 17 defendants alleging patent infringment and a variety of non-patent claims. On March 11, 1985 this court dismissed with leave to amend all but Count V, the count alleging patent infringment, for failure to state claims upon which relief could be granted. Plaintiff thereafter filed a first amended complaint, which essentially reiterated the allegations of the original complaint. Defendants moved to dismiss with prejudice all but count V of the first amended complaint and moved to strike certain

paragraphs pursuant to Fed.R.Civ.P. 12 (f). Before defendants' motion could be heard, plaintiff filed a second amended complaint, against which the defendants again moved to dismiss. By order entered on July 11, 1985, this court dismissed, with prejudice, all but Count V of plaintiff's second amended complaint for failure to state any claims upon which relief could be granted, and ordered certain material in the complaint stricken because it was immaterial or redundant.

The various defendants then answered the remaining allegations of the plaintiff's second amended complaint, and filed counter-claims for declaratory relief, seeking determinations that plaintiff's alleged patents are invalid, unenforceable and not infringed.

Plaintiff responded with affirmative defenses to each counterclaim which were

substantially similar to the claims made in the pleadings that were dismissed, and moved for summary judgment, and demanded a jury trial for the non-infringing claims dismissed with prejudice by this court. Defendants moved to strike portions of plaintiff's complaint pursuant to Rule 12 (f), and opposed the summary judgment and jury trial motions. Plaintiff's motions for summary judgment and a jury trial were denied, and defendants' motions to strike were granted by order of this court on November 7, 1985.

Plaintiff now moves, pursuant to Rule 57, for declaratory judgments holding that 35 U.S.C. 282 (2) and (3) and federal laws relating to scientific research and development are unconstitutional because they are inconsistent with Art. I * 8 Cl. 8 of the United States Constitution. In addition, plaintiff seeks to dismiss or

strike defendants' answers and affirmative defenses on the ground that: 1) they are based on an unconstitutional law, 35 U.S.C. * 282; 2) they do not recite 35 U.S.C. * 282 as their legal basis; and 3) the patent laws do not authorize counterclaims seeking a determination of invalidity.

The motions for declaratory judgments are procedurally defective. F.R.Civ.P. 57 provides in relevant part: "The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C. * 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rule 38 and 39." Rule 57 merely provides that the federal rules apply to claims for declaratory relief made pursuant to 28 U.S.C. * 2201. Without an underlying claim for declaratory relief pending, the rule has no effect. Plaintiff

has a claim for patent infringement; there are no claims remaining for declaratory relief. Rule 57 does not provide a basis for this court to act on these motions.

Plaintiff claims that Art. I *8 Cl.8 of the Constitution which empowers Congress "(t)o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries", is violated by 35 U.S.C. * 282 and by federal laws relating to scientific research and development. Plaintiff's theory is that these laws do not promote the progress of science, and in effect operate to deprive inventors security for their inventions. This is an argument appropriately made to Congress, not this court. The constitutional provision cited by plaintiff is not self-executing. "It empowers but does not command the Congress

to grant patent rights." Call v. Japan Airlines, Inc. 380 F.Supp. 1120 (E.D.N.Y. 1974). As has been stated by the Supreme Court, "Congress having created the (patent) monopoly, may put such limitations upon it as it pleases." Mast, Foos & Co. v. Stover Mfg. Co. 177 U.S. 485 (1900). Plaintiff's arguments are directed to Congressional policy decisions; the determination of whether a given law "promotes science" for purposes of the constitutionality of the law is left to Congress, not this court.

Plaintiff also seeks this court to dismiss defendants' counterclaims pursuant to Rule 12 (b), or strike pursuant to Rule 12 (f). This motion is procedurally defective. Rule 12 (b) requires that all motions to dismiss be made before pleading if a further pleading is permitted, and Rule 12 (f) requires that a motion to strike be made "before responding to a pleading".

Plaintiff responded to defendants' counterclaims well before filing these motions to dismiss and strike, and thus they are untimely.

Plaintiff argues that the counterclaims are deficient because they do not cite to 35 U.S.C. * 282, but does not dispute that 35 U.S.C. * 282 (if constitutional) provides defendants with potential defenses to plaintiff's claim. The rules of pleading require only a short and plain statement of the claim showing that the pleader is entitled to relief. The objective of the rules of pleading to give the party fair notice of the nature and basis of the claim. Wright & Miller, 5 Federal Practice and Procedure * 1215. Defendants' pleadings give plaintiff sufficient notice of the nature and basis of the counterclaims.

Plaintiff also argues that the patent laws do not authorize the bringing of counterclaims alleging invalidity, but provides no legal support for his theory. An action for a declaratory judgment is properly brought by one accused of infringement. Hanes Corp. v. Millard 531 F.2d 585 (D.C. Cir. 1976). There is no basis for holding that the claim for declaratory relief cannot be brought as a compulsory counterclaim.

Accordingly, plaintiff's motions for declaratory judgment are denied. Plaintiff's motions to dismiss and to strike are also denied.

DATED: December 10, 1985.

Pamela Ann Rymer
United States District Judge

CERTIFICATE OF SERVICE

I certify that the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT was served on all parties on 7 May, 1986, 1986 by mailing first class a true and correct copy thereof to them addressed as follows:

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